A Synopsis of the Rules of Evidence in Immigration Removal Proceedings

By Simon Azar-Farr

I. Introduction

Although one uses the terms "court" and "judge" when discussing immigration removal proceedings, they are far removed from Article III courts. In fact, an Immigration Judge (IJ) is not even subject to the strictures of the Administrative Procedure Act (APA).[1] Until 1952, immigration proceedings maintained no appearance of impartiality. The person invested with the power to send an alien out of the United States was simply a regular immigration inspector, who "himself presented the government's evidence against the alien, interrogated witnesses, and prepared a decision."[2] Over the years this role became substantially more judicial. The Immigration and Nationality Act (INA) of 1952 and subsequent internal agency reforms separated the prosecutorial role from the judicial, removing the special inquiry officers (SIOs — the predecessor title for IJs) from direct reporting to superiors also responsible for enforcement and allowing SIOs greater neutrality.[3] Regulations began terming the SIOs "judges" in 1972 and allowed them to wear black robes,[4] and in 1996 Congress required IJs to be licensed attorneys.[5]

The professional lives of IJs are much different than those of their Article III counterparts. IJs are given a relatively free hand in pursuing evidence; they are specifically permitted to question witnesses and establish the record.[6] They are appointed and may be removed from their positions, as may the members of the reviewing Board of Immigration Appeals (BIA). Indeed, in recent years much controversy has raged as to the political nature of both appointments and removals.[7] Even the

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[1] 5 U.S.C. § 500 et seq.; *see* Dory Mitros Durham, Note, *The Once and Future Judge: The Rise and Fall (and Rise?) of Independence in U.S. Immigration Courts*, 81 Notre Dame L. Rev. 655, 671 n.77 (2006) ("[A]dministrative law judges are subject to greater requirements for appointment and entitled to greater civil service protections, as well as greater independence from the enforcement agency whose cases they adjudicate than are their immigration judge counterparts."). In response to a Supreme Court decision requiring that deportation proceedings follow the APA's formal adjudicative requirements, *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), Congress specifically exempted immigration proceedings from the APA. Act of Sept. 27, 1950, ch. 1052, 64 Stat. 1044, 1048.

[2] Durham, *supra* note 1, at 663-64.

[3] Pub. L. No. 82-414, ch. 477, 66 Stat. 163, §§ 236(a), 242(b); Durham, *supra* note 1, at 672-73. However, "the SIOs still remained a part of the district system for other realities of life — such as facilities, office space, and staff," and were thus vulnerable to in-kind reprisals by the prosecutorial wing of the agency for decisions regarded as too immigrant-friendly. *Id.*

[4] Immigration and Naturalization Service Definitions: Immigration Judge, 38 Fed. Reg. 8590, 8590 (Apr. 4, 1973) (amending 8 C.F.R. § 1.1); Linda Kelly Hill, *Holding the Due Process Line for Asylum*, 36 Hofstra L. Rev. 85, 97 n.45 (2007).

[5] The Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-408, 110 Stat. 3009, Div. C (Illegal Immigration Reform and Immigrant Responsibility Act) (1996) in § 371(a) amended INA § 101(b)(4), 8 U.S.C. § 1101(b)(4), by, *inter alia*, defining "immigration judge" as an attorney. Note that this had already been the agency's practice. *See* Durham, *supra* note 1, at 669 n.67.

[6] INA § 240, 8 U.S.C. § 1229a(b)(1) ("The immigration judge shall . . . interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence."); Yang v. McElroy, 277 F.3d 158, 162 (2d Cir. 2002) (an IJ, "unlike an Article III judge, is not merely the fact finder and adjudicator but also has an obligation to establish the record.").

[7] The *Washington Post* reported that political hiring of IJs was endemic; "at least one-third of the immigration judges appointed by the Justice Department since 2004 have strong Republican affiliations and [] half lacked experience in immigration law." Hill, *supra* note 4, at 88 n.10. The Department of Justice itself " 'expressed concerns' regarding the political screening of immigration judges and BIA members."). *Id.* at n.9. IJs felt pressured by the Bush administration to rule for the government, on pain of being removed from their positions. Stephen H. Legomsky, *Deportation and the War on Independence*, 91 Cornell L. Rev. 369, 373-75 (2006). Moreover, despite an enormous backlog of cases, Attorney General John Ashcroft cut the number of BIA board members from twenty-three to eleven, reassigning those members of the Board most friendly to aliens. "After the procedural changes of 2002, . . . the proportion of rulings in favor of appellants declined quite substantially." Lawrence Baum, *Immigration Law and Adjudication: Judicial Specialization and the Adjudication of Immigration Cases*, 59 Duke L.J. 1501, 1524, 1527 (2010).

precedent they follow is subject to alteration, as the Attorney General may certify to himself any decision of the BIA and override the BIA's holding.[8] And, whether due to the overwhelming crush of immigration cases, political interference and patronage, or lack of competence, IJs have received scathing criticism at times from circuit courts, who found their decisions to reflect a "systemic failure by the judicial officers of the immigration service to provide reasoned analysis" when assessing aliens' claims for immigration relief.[9] As an IJ once reported of his work, "these are death penalty cases being handled with the resources of traffic court."[10]

It should come as no surprise, then, that the introduction of evidence in immigration proceedings is much less formal than in state or federal courts, and IJs are not required to observe the Federal Rules of Evidence or the Federal Rules of Civil Procedure.[11] Instead, immigration judges are afforded broad discretion when determining what evidence to admit.[12]

Even so, evidence in immigration proceedings is not a free-for-all. Federal regulations permit immigration judges only to consider evidence that "is material and relevant to any issue in the case. . . ."[13] A removal order is not "valid unless it is based upon reasonable, substantial, and probative evidence."[14] Furthermore, even though immigration proceedings are civil rather than criminal, they must still comport with "due process standards of fundamental fairness."[15]

The standard for the admission of evidence is "whether the evidence is probative and its admission is fundamentally fair."[16] To inform this inquiry, immigration courts often refer to the Federal Rules of Evidence and of Civil Procedure. These rules, "while not binding, may provide helpful guidance," since "the fact that specific evidence would be admissible under the Federal Rules 'lends strong support to the conclusion that admission of the evidence comports with due process.' "[17] Yet hearsay, both spoken and written, is generally admissible.[18]

Expert evidence in particular is often assessed in light of the Civil Rules and federal jurisprudence.[19] Documentary evidence that meets the relevance and materiality thresholds must still be verifiable. The regulations set out specific authentication procedures for official documents, both foreign and domestic.[20] Common privileges, such as the attorney-client and marital privileges, apply in immigration proceedings.[21]

However, the Fourth Amendment's exclusionary rule generally does not, absent special circumstances.[22]

II. Requirements for Evidence

A. Admission of Evidence Generally

As mentioned above, immigration proceedings tend to favor the liberal admission of evidence. Federal regulations permit IJs to admit any testimony

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[8] 8 C.F.R. § 1003.1(h)(1)(i).

[9] Guchshenkov v. Ashcroft, 366 F.3d 554, 560 (7th Cir. 2004). Courts have decried opinions that are "literally incomprehensible," *Recinos de Leon v. Gonzales*, 400 F.3d 1185, 1187 (9th Cir. 2005), and deriving from "factual error, bootless speculation, and errors of logic," *Pramatarov v. Gonzales*, 454 F.3d 764, 765 (7th Cir. 2006). Courts find the argument that immigration judges are overworked unpersuasive; "[t]he same is true . . . of federal district judges, and we have never heard it argued that busy judges should be excused from having to deliver reasoned judgments because they are too busy to think." *Id.* at 765.

[10] Appleseed, Assembly Line Injustice: Blueprint to Reform America's Immigration Courts 1 (2009), *available at* http://appleseednetwork.org.

[11] Soto-Hernandez v. INS, 726 F.2d 1070 (5th Cir. 1984); Marroquin-Manriquez v. INS, 699 F.2d 129 (3d Cir. 1983).

[12] Matter of D-R-, 25 I. & N. Dec. 445, 458 (BIA 2011).

[13] 8 C.F.R. §§ 1240.7(a), 1240.46(b); *see also* 8 C.F.R. § 1240.1(c) ("The immigration judge shall receive and consider *material and relevant* evidence, rule upon objections, and otherwise regulate the course of the hearing.") (emphasis added).

[14] 8 U.S.C. § 1229a(c)(3)(A).

[15] Gutierrez v. Holder, 662 F.3d 1083, 1091 (9th Cir. 2011) ("A full and fair hearing is one of the due process rights afforded to aliens in deportation proceedings.") (citations and quotation marks omitted); Bustos-Torres v. INS, 898 F.2d 1053, 1055 (5th Cir. 1990) (citing Bridges v. Wixon, 326 U.S. 135 (1945)).

[16] Matter of Velasquez, 25 I. & N. Dec. 680, 683 (BIA 2012) (quoting *Matter of D-R-*, 25 I. & N. Dec. at 458).

[17] *Matter of D-R-*, 25 I. & N. Dec. at 458 n.9 (quoting Felzcerek v. INS, 75 F.3d 112, 116 (2d Cir. 1996)); *see also* Ohio v. Roberts, 448 U.S. 56, 66 (1980) ("Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception."); Webb v. Lane, 922 F.2d 390, 393 (7th Cir. 1991) ("It is not likely that a settled hearsay exception will violate any clause of the Constitution.").

[18] *See* Part II(C).

[19] *See* Part II(D).

[20] *See* Part III.

[21] *See* Part IV(A).

[22] *See* Part IV(C).

or documentary evidence "that is material and relevant to any issue in the case."[23] Black's Law Dictionary defines "relevant evidence" as that "tending to prove or disprove a matter in issue,"[24] consistent with the definition under the Federal Rules of Evidence, which defines it as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[25] "[M]aterial evidence" is "[e]vidence having some logical connection with the consequential facts or the issues."[26] "Materiality requires both relevance to the matter at hand and probative value."[27] Due process also requires that the evidence considered be "reliable and trustworthy."[28]

Aliens have a statutory as well as a due process right to present (or exclude) evidence in support of their cases, and improper exclusion (or inclusion) of evidence may violate this right.[29] For instance, "barring complete chunks of oral testimony that would support the applicant's claims" contravenes due process.[30] However, the alien's right to offer evidence is "not absolute but . . . circumscribed by the due process concept of reasonableness."[31] Moreover, the IJ has broad discretion to exclude evidence "that is redundant, irrelevant or otherwise unhelpful."[32]

B. Hearsay

One of the most notable differences from practice in judicial courts is the use of hearsay. The regulations allow into evidence "any oral or written statement . . . previously made by the respondent or any other person during any investigation, examination, hearing, or trial."[33] In immigration court, both sides routinely rely upon hearsay to prove their cases.[34]

The use of hearsay is nonetheless limited by an individualized determination of whether it will violate "the tests of fundamental fairness and probity."[35] Due process guarantees (whether rooted in a statute or the Constitution) "require that the government's choice whether to produce a witness or to use a hearsay statement [not be] wholly unfettered."[36] Aliens have a statutory right to examine the evidence presented against them,[37] and aliens must "be given a reasonable opportunity to confront and cross-examine witnesses."[38] Accordingly, courts have held that "the

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[23] 8 C.F.R. §§ 1240.7(a), 1240.46(c).

[24] Black's Law Dictionary 578 (7th ed. 1999).

[25] Fed. R. Evid. 401.

[26] Black's Law Dictionary 579.

[27] Makonnen v. INS, 44 F.3d 1378, 1386 (8th Cir. 1995).

[28] Ezeagwuna v. Ashcroft, 325 F.3d 396, 405-06 (3d Cir. 2003); *Felzcerek*, 75 F.3d at 115.

[29] 8 U.S.C. § 1229a(b)(4)(B) (guaranteeing aliens "a reasonable opportunity . . . to present evidence on the alien's own behalf"); Oliva-Ramos v. Att'y Gen. of the United States, 694 F.3d 259, 272 (3d Cir. 2012) ("concerns for brevity, efficiency and expedience must not be used to justify denying an alien the right to produce witnesses where that request is appropriate and the witnesses' presence appears necessary to satisfy basic notions of due process."); Cortez v. United States Att'y Gen., 2011 U.S. App. LEXIS 22224, at *5 (11th Cir. Nov. 11, 2011) ("Due process requires that aliens be given notice and an opportunity to be heard in their removal proceedings."); Colmenar v. INS, 210 F.3d 967, 971 (9th Cir. 2000).

[30] Kerciku v. INS, 314 F.3d 913, 918 (7th Cir. 2003); *see also* Zolotukhin v. Gonzales, 417 F.3d 1073, 1075-76 (9th Cir. 2005) (finding that the IJ had violated the alien's due process rights by preventing him from presenting testimony from family members and an expert witness to support his persecution claim); Juncaj v. Holder, 2009 U.S. App. LEXIS 5440, at *21 (6th Cir. Mar. 16, 2009) (calling removal proceedings fundamentally unfair when the petitioners "had no opportunity to examine the evidence against them, to present evidence on their own behalf, or to cross-examine any witness the Service might have presented.").

[31] Matter of D-, 20 I. & N. Dec. 827, 831 (BIA 1994) (citing 8 U.S.C. § 1252(b)).

[32] Radsphone v. Holder, 2010 U.S. App. LEXIS 5870, at *2 (9th Cir. Mar. 12, 2010) (unpublished).

[33] 8 C.F.R. §§ 1240.7(a), 1240.46(c).

[34] Duad v. Holder, 556 F.3d 592, 596 (7th Cir. 2009) ("Nothing in the due process clause, however, precludes the use of hearsay evidence in administrative immigration proceedings."); Olabanji v. INS, 973 F.2d 1232, 1234 (5th Cir. 1992) ("The rules of evidence, including those that exclude hearsay, do not govern deportation proceedings.").

[35] *Bustos-Torres*, 898 F.2d at 1055 (citing Calderon-Ontiveros v. INS, 809 F.2d 1050, 1053 (5th Cir. 1986)); *see also* Rojas-Garcia v. Ashcroft, 339 F.3d 814, 823 (9th Cir. 2003) ("[H]earsay is admissible in immigration proceedings. . . . [I]n immigration proceedings the sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair.") (internal quotation marks and citation omitted).

[36] Hernandez-Guadarrama v. Ashcroft, 394 F.3d 674, 681 (9th Cir. 2005) (internal quotation marks omitted) (alteration in original).

[37] 8 U.S.C. § 1229a(b)(4)(B); 8 C.F.R. § 1240.10(a)(4).

[38] *Hernandez-Guadarrama*, 394 F.3d at 681; *see also* Gonzalez-Reyes v. Holder, 2009 U.S. App. LEXIS 3937, at *19 (5th Cir. Feb. 26, 2009) (unpublished); 8 C.F.R. § 1240.10(a)(4). *But see Felzcerek*, 75 F.3d at 117 (holding that aliens may not use their right to cross-examine adverse witnesses "to prevent the government from establishing uncontested facts.") (quoting Espinoza v. INS, 45 F.3d 308, 310 (9th Cir. 1995), and *Olabanji*, 973 F.2d at 1234 n.1).

use of affidavits from persons who are not available for cross-examination does not satisfy the constitutional test of fundamental fairness unless the INS first establishes that despite reasonable efforts it was unable to secure the presence of the witness at the hearing."[39] Thus, the Ninth Circuit found that it might violate due process to admit as the sole proof that an alien had engaged in alien smuggling the hearsay statement of a declarant who was at risk of felony prosecution when he made his statement and whom the government had then deported, as the government had failed to make any reasonable effort to produce the declarant.[40] Likewise, an alien was deprived of a fair hearing when the government did not "disclose [] DHS forensic reports in advance of the hearing or to make the reports' author available for cross-examination," since the IJ considered those reports in her decision.[41]

Admission of hearsay could also raise due process concerns if the document in question "did not relate to the respondent, . . . the information was erroneous, or . . . it was the result of coercion or duress."[42] Moreover, the IJ must evaluate the reliability of the documents before the court.[43] Documents with no indicia of reliability may raise due process concerns.[44]

Nevertheless, the use of hearsay is routine; absent a showing of a lack of reliability or fairness, hearsay evidence is commonly admitted. IJs often balance any concerns about the hearsay nature of the evidence by affording it less weight, rather than refusing to admit it.[45]

Courts are quick to point out that the flexibility in admission of hearsay evidence often significantly aids aliens who must prove elements such as past persecution, hardship, or good moral character, but who often have limited access to supporting documentation and whose witnesses may not be able to testify because of distance (many in fact live abroad), work schedules, or other constraints, but who are willing to provide letters and affidavits to the court. Barring the use of hearsay therefore "would severely penalize many asylum seekers, who manage to slip out of their country of origin with only a few crucial documents and other written materials that could never be authenticated by traditional courtroom practices."[46]

C. Expert Evidence

Expert evidence may be helpful in immigration proceedings, for example, to explain country conditions (in asylum and related cases), or the mental or physical condition of the alien or her family members (for asylum or to demonstrate hardship, which is relevant to various forms of immigration relief). "Immigration Judges, like other trial judges generally, are often required to determine factual disputes regarding matters on which they possess little or no knowledge or

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[39] Hernandez-Garza v. INS, 882 F.2d 945, 948 (5th Cir. 1989); *see also* Cinapian v. Holder, 567 F.3d 1067, 1075 (9th Cir. 2009) ("[T]he government must make a reasonable effort in [immigration] proceedings to afford the alien a reasonable opportunity to confront the witnesses against him or her."); Dae Wan Jung v. INS, 1 F.3d 1244 (7th Cir. 1993) (unpublished) ("Due process is satisfied by the admission of affidavits of persons unavailable for cross-examination if the INS 'establishes that despite reasonable efforts it was unable to secure the presence of the witness at the hearing' ") (citing *Hernandez-Garza*). The Immigration and Naturalization Service (INS) was dissolved in 2003; most of its work for the purposes of this article is now done by the Department of Homeland Security (DHS) component U.S. Immigration and Customs Enforcement (ICE).

[40] *Hernandez-Guadarrama*, 394 F.3d at 682 ("It is clear that the burden of producing a government's hearsay declarant that [a petitioner] may wish to cross-examine is on the government, not the petitioner. The government may not evade its obligation to produce its witness by taking affirmative steps, such as deportation, that render the witness unavailable.") (internal citations and quotation marks omitted).

[41] *Cinapian*, 567 F.3d at 1075.

[42] Matter of Barcenas, 19 I. & N. Dec. 609, 611 (BIA 1988) (leaving open the possibility that admission of a Form 213 (Record of Deportable Alien, memorializing an alien's admissions to immigration officers) could violate due process in those circumstances); *see also* Matter of Grijalva, 19 I. & N. Dec. 713 (BIA 1988) (citing INS v. Lopez-Mendoza, 468 U.S. 1032, 1050-51 (1984); Matter of Toro, 17 I. & N. Dec. 340, 343 (BIA 1980)) (upholding the admission of police reports when the respondent made no showing of fundamental unfairness, such as, "for example, that he made statements involuntarily to the officers who arrested him, or that the police officers acted egregiously in seizing evidence at his house.").

[43] Banat v. Holder, 557 F.3d 886, 892-93 (8th Cir. 2009) (holding "that the IJ's reliance on the State Department letter, which provided no details about the investigation that would allow the IJ to assess the investigation's reliability or trustworthiness and which contained multiple levels of hearsay, violated [the alien's] right to a fundamentally fair hearing," despite the common reliance upon hearsay reports by State Department officials where such reports are "shown to be trustworthy.").

[44] *Id*.; *see also* Alexandrov v. Gonzales, 442 F.3d 395 (6th Cir. 2006) ("Highly unreliable hearsay might raise due process problems.") (quoting Yongo v. INS, 355 F.3d 27, 31 (1st Cir. 2004)).

[45] *Matter of D-R-*, 25 I. & N. Dec. at 461 (citing Gu v. Gonzales, 454 F.3d 1014, 1021 (9th Cir. 2006)); *see also* Xiaoguang Gu v. Gonzales, 454 F.3d 1014, 1021 (9th Cir. 2006); Chen v. Gonzales, 434 F.3d 212, 218 (3d Cir. 2005); Matter of Kwan, 14 I. & N. Dec. 175, 177 (BIA 1972)).

[46] *Duad*, 556 F.3d at 596.

substantive expertise, and, in making such determinations, they typically rely on evidence, including expert testimony, presented by the parties."[47]

IJs often apply the Federal Rules of Evidence to assess whether expert witness would be helpful in a given case. The Federal Rules provide that a witness whose "knowledge, skill, experience, training, or education" qualifies her as an expert may offer her opinion in a case if she has "scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue" and if her methods and testimony are sufficiently reliable.[48] The line of federal cases that assess expert witness qualifications and reliability, such as *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[49] *Kumho Tire Co. v. Carmichael*,[50] and their progeny, is also often applied.[51]

Courts vary in the degree of specialization they require before accepting a witness as an expert.[52] Even if the judge allows the witness to testify as an expert, she "may give different weight to the testimony, depending on the extent of the expert's qualifications or based on other issues regarding the relevance, reliability, and overall probative value of the testimony as to the specific facts in issue in the case."[53]

In keeping with the less formal nature of immigration proceedings, expert evidence may be presented as testimony or through written reports.[54] Indeed, immigration and judicial courts have at times expressed a preference for written reports over oral testimony.[55]

D. Alien'S Right to Examine the Evidence

Aliens are guaranteed by statute "a reasonable opportunity to examine the evidence against" them.[56] Thus aliens are allowed to examine documents in the government's possession that may affect the outcome of proceedings.[57]

In rare cases, the government will resist the production of evidence on national security grounds. The regulations allow classified information to be used in immigration proceedings without disclosing it to the alien.[58] They do provide for some review of the

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[47] Matter of Marcal Neto, 25 I. & N. Dec. 169, 176 (BIA 2010).

[48] Fed. R. Evid. 702.

[49] 509 U.S. 579 (1993).

[50] 526 U.S. 137 (1999).

[51] Niam v. Ashcroft, 354 F.3d 652, 660 (7th Cir. 2004) ("the federal rules of evidence do not apply to the federal administrative agencies; so, strictly speaking, neither does *Daubert*. But the spirit of *Daubert* . . . does apply to administrative proceedings.") (internal citations omitted).

[52] *Compare* Bouchikhi v. Holder, 676 F.3d 173, 181 (5th Cir. 2012) (per curiam) (unpublished) (finding an expert unqualified as a specialist in Algerian extremism, despite "a sustained professional interest in religious extremism," and the fact that much of "his recent unpublished work" and "his present teaching load" covered related topics, since "his dissertation and peer-reviewed publications were on different sociological topics."), *with Niam*, 354 F.3d at 659-60 (finding no evidence of a witness's lack of qualification as an expert on Bulgarian political conditions when she taught "a course in Eastern European Politics, including a week on Bulgarian politics" and had "been following Bulgarian politics on an almost daily basis since 1993," remarking that "[t]here is no ironclad requirement that an academic, to be qualified as an expert witness, must publish academic books or articles on the precise subject matter of her testimony.").

[53] *Matter of D-R-*, 25 I. & N. Dec. at 460 n.13.

[54] Richardson v. Perales, 402 U.S. 389 (1971) (permitting the introduction of written medical reports in administrative hearings without accompanying live testimony).

[55] Djedovic v. Gonzales, 441 F.3d 547, 551 (7th Cir. 2006) ("As between oral testimony alone and a written report alone, the latter may be more helpful, because it facilitates review of the conclusions' logical and empirical force."). *But see* Lopez-Umanzor v. Gonzales, 405 F.3d 1049, 1059 (9th Cir. 2005) (finding it error to exclude live testimony that would have covered different issues than those canvassed in the experts' written affidavits).

[56] 8 U.S.C. § 1229a(b)(4)(B).

[57] Dent v. Holder, 627 F.3d 365, 374 (9th Cir. 2010) (failing to disclose to an alien the documents in his A-file "denied [him] an opportunity to fully and fairly litigate his removal and his defensive citizenship claim."); Ibarra-Flores v. Gonzales, 439 F.3d 614, 620-21 (9th Cir. 2006) (directing the IJ "upon remand [to] order the production of all forms referencing petitioner's departure from the United States," since the production of such forms might affect the outcome of proceedings).

[58] 8 C.F.R. §§ 1240.11(a)(3) (allowing IJs, when deciding LPR applications, to "consider and base the decision on information not contained in the record and not made available for inspection by the alien, provided the Commissioner has determined that such information is relevant and is classified under the applicable Executive Order as requiring protection from unauthorized disclosure in the interest of national security."),1240.49(a) (same), 1240.33(c)(4) (allowing DHS counsel to "call witnesses and present evidence for the record, including information classified under the applicable Executive Order, provided the immigration judge or the Board has determined that such information is relevant to the hearing.").

information by the alien, albeit in largely precatory terms.[59] Due process also restricts the use of secret evidence.[60] Courts have stepped in to limit its use without proper notice to the alien.[61]

III. Privileges and the Exclusionary Rule

Immigration proceedings recognize certain privileges, including attorney-client privilege, marital privilege, and the Fifth Amendment right against self-incrimination. Involuntary statements may not be used in immigration proceedings, but the exclusionary rule generally does not apply to immigration proceedings, absent special circumstances.

A. Privileges

1. Privilege against self-incrimination

The Fifth Amendment to the United States Constitution declares that no individual "shall be compelled in any criminal case to be a witness against himself."[62] The Supreme Court has found that this right is not limited to criminal proceedings. A witness may invoke the right to refuse to answer questions in "any other proceeding, civil or criminal, formal or informal, investigatory or adjudicatory, where the answers might incriminate him in future criminal proceedings."[63] An alien who entered the country illegally is entitled to rely on the Fifth Amendment to not testify about his status because illegal entry is a federal crime.[64] Thus, the BIA has held that immigration courts should disregard any admissions by the alien obtained after the alien "was improperly denied her Fifth Amendment privilege against self-incrimination."[65]

Invoking the Fifth is not without cost, however. Because immigration cases are civil proceedings, the IJ is permitted to draw adverse inferences from the alien's refusal to testify.[66] Moreover, because of the burden of proof in removal proceedings, silence often does not serve the alien well. In the case of arriving aliens and aliens charged with lack of legal status, the alien bears the burden of proving she should not be removed,[67] and she cannot discharge

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[59] 8 C.F.R. §§ 1240.11(a)(3) ("Whenever the immigration judge believes that he or she can do so while safeguarding both the information and its source, the immigration judge should inform the alien of the general nature of the information in order that the alien may have an opportunity to offer opposing evidence."), 1240.49(a) (same), 1240.33(c)(4) (requiring the applicant to "be informed when the immigration judge receives such classified information," and providing that "[t]he agency that provides the classified information to the immigration judge may provide an unclassified summary of the information for release to the applicant whenever it determines it can do so consistently with safeguarding both the classified nature of the information and its source. The summary should be as detailed as possible, in order that the applicant may have an opportunity to offer opposing evidence.").

[60] Kaur v. Holder, 561 F.3d 957, 962 (9th Cir. 2009) ("[T]here are limits on the admissibility of evidence and [] the test for admissibility includes fundamental fairness.").

[61] *Id*. at 961-62 (holding that the BIA had violated due process when it considered secret evidence on remand that it had earlier set aside due to a lack of fair notice to the alien and the failure to follow the regulations).

[62] U.S. Const. amend. V.

[63] Lefkowitz v. Turley, 414 U.S. 70, 77 (1973).

[64] 8 U.S.C. § 1325(a).

[65] Matter of Sandoval, 17 I. & N. Dec. 70, 72 (BIA 1979).

[66] *Lopez-Mendoza*, 468 U.S. at 1043 (quoting United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 153-54 (1923)); *see also* Murdock v. Att'y Gen. of the United States, 2005 U.S. App. LEXIS 7618, at *6 (3d Cir. May 3, 2005) (unpublished) ("Murdock's refusal to testify entitled the Immigration Judge to draw a negative inference that any answer he may have given would have been adverse to his interests and to conclude that the statement was reliable and trustworthy."); Cabral-Avila v. INS, 589 F.2d 957, 959 (9th Cir. 1978) ("Petitioners' decision to remain mute during the deportability phase of the hearing was an appropriate exercise of their Fifth Amendment privilege, but by doing so they do not shield themselves from the drawing of adverse inferences that they are not legally in this country and their silence cannot be relied upon to carry forward their duty to rebut the Government's Prima facie case."). "In a criminal proceeding, by contrast, any comment on or adverse inference drawn from a defendant's assertion of his or her right not to testify violates the Fifth Amendment." United States v. Carriles, 832 F. Supp. 2d 699, 701-02 (W.D. Tex. 2010) (citing Griffin v. California, 380 U.S. 609, 614 (1965)).

[67] 8 U.S.C. § 1361 (providing that in removal proceedings, "the burden of proof shall be upon [the alien] to show the time, place, and manner of his entry into the United States," and that "[i]f such burden of proof is not sustained, such person shall be presumed to be in the United States in violation of law."); 8 C.F.R. §§ 1240.8(b) ("In proceedings commenced upon a respondent's arrival in the United States or after the revocation or expiration of parole, the respondent must prove that he or she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged."), 1240.8(c) ("In the case of a respondent charged as being in the United States without being admitted or paroled, the Service must first establish the alienage of the respondent. Once alienage has been established, unless the respondent demonstrates by clear and convincing evidence that he or she is lawfully in the United States pursuant to a prior admission, the respondent must prove that he or she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged."). Note, however, that if there is no evidence of record at all as to the respondent's alienage, the agency may not rely upon the respondent's silence to establish it. Matter of Guevara, 20 I. & N. Dec. 238, 242 (BIA 1990, 1991) ("Under the circumstances presented here, the respondent's silence alone does not provide sufficient evidence, in the absence of any other evidence of record at all, to establish a prima facie case of alienage, sufficient to shift the burden of proof to the respondent under section 291 of the Act.").

that burden by relying upon the Fifth Amendment.[68] The alien also bears the burden of demonstrating her eligibility for relief from removal.[69]

2. Other privileges

The attorney-client and husband-wife privileges have also been applied to immigration cases.[70] The attorney-client privilege prevents the disclosure of confidential communications that were "made for the purpose of seeking or receiving legal advice."[71]

The marital privilege has two aspects: A witness may refuse to testify against her spouse,[72] and an individual in proceedings may object to his spouse testifying concerning "confidential communications made during the marriage."[73]

Neither aspect of the privilege applies to testimony:

- On behalf of the other spouse;
- Against the other spouse, if the matters arose before the marriage;
- Against the other spouse where it appears the marriage was not entered into in good faith, but with the intention of using the marriage ceremony in a scheme to defraud under the immigration laws;
- Against the other spouse in a prosecution under INA § 278 (importation of alien for an immoral purpose).[74]

B. *Miranda* Warnings And Involuntary Statements

Involuntary statements by an alien are inadmissible in immigration proceedings, because they violate due process.[75] To establish that an alien's prior statements to immigration officers were involuntary, the alien must show that they were prompted by "coercion, duress, or improper action on the part of the immigration officer."[76] "Indicia of coercion or duress" include "promises, prolonged interrogation, [or] interference with his right to counsel."[77] For example, the BIA reversed a finding of deportability and terminated proceedings when the INS's sole evidence of deportability was admissions obtained from the alien after the alien was refused counsel.[78]

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[68] Matter of Gonzalez, 16 I. & N. Dec. 44, 47 (BIA 1976); Quintana v. INS, 1994 U.S. App. LEXIS 33731, at *6-7 (9th Cir. 1994) (unpublished) ("Because Quintana presented no evidence, she failed to carry the burden imposed by section 291 of demonstrating that she had entered the country legally.") (citing Veneracion v. INS, 791 F.2d 778, 780 (9th Cir. 1986); Matter of Benitez, 19 I. & N. Dec. 173 (BIA 1984)).

[69] 8 C.F.R. § 1240.8(d) ("The respondent shall have the burden of establishing that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion. If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.").

[70] The BIA appears to recognize the applicability of both privileges in immigration proceedings. *Matter of Gonzalez*, 16 I. & N. Dec. at 46-47 (finding that any violation of the husband-wife privilege was immaterial since other evidence supported the finding of alienage); Matter of Athanasopoulos, 13 I. & N. Dec. 827, 830-31 (BIA 1971) (finding the attorney-client privilege to have been lost when the representation was in pursuit of a fraudulent claim).

[71] *In re* Keeper of Records (Grand Jury Subpoena Addressed to XYZ Corp.), 348 F.3d 16, 22 (1st Cir. 2003); *see also* United States v. Plache, 913 F.2d 1375, 1379 n.1 (9th Cir. 1990) ("(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived. . . .") (quoting United States v. Landof, 591 F.2d 36, 38 (9th Cir. 1978)).

[72] Georgia v. Randolph, 547 U.S. 103, 133 (2006); Trammel v. United States, 445 U.S. 40, 53 (1980).

[73] *Trammel*, 445 U.S. at 51; Blau v. United States, 340 U.S. 332 (1951).

[74] 8 U.S.C. § 1328; USCIS, Adjudicator's Field Manual 11.1(j) (last accessed July 8, 2013), *available at* http://www.uscis.gov/ and on LexisNexis's online services.

[75] *Bustos-Torres*, 898 F.2d at 1057 (citing United States v. Alderete-Deras, 743 F.2d 645, 647 (9th Cir. 1984)); *Matter of Sandoval*, 17 I. & N. Dec. at 83.

[76] *Bustos-Torres*, 898 F.2d at 1057 (citing Cuevas-Ortega v. INS, 588 F.2d 1274, 1278 (9th Cir.1979)); *see also* United States v. Rodriguez-Hernandez, 353 F.3d 632, 636 (8th Cir. 2003).

[77] Lopez-Gabriel v. Holder, 653 F.3d 683, 687 (8th Cir. 2011).

[78] Matter of Garcia, 17 I. & N. Dec. 319, 320-21 (BIA 1980).

However, the simple failure to give *Miranda* warnings does not render a statement involuntary.[79] *Miranda* warnings need not be given for the purposes of immigration proceedings, since the Sixth Amendment does not apply to civil proceedings.[80]

Nevertheless, federal regulations do require DHS agents to follow certain procedures after arresting aliens without a warrant. In general, "an alien arrested without warrant and placed in formal [removal] proceedings" must "be advised of the reasons for his or her arrest and the right to be represented at no expense to the Government," be given "a list of the available free legal services," and be warned "that any statement made may be used against him or her in a subsequent proceeding."[81] An alien may contest the violation of this rule if she can show that it prejudiced her.[82]

C. Exclusionary Rule

The exclusionary rule is a doctrine developed by courts to prevent the admission of "evidence obtained in violation of a defendant's Fourth Amendment rights."[83] The doctrine was developed in the context of criminal proceedings, and the Supreme Court has resisted its application to civil cases.[84]

In 1984, the Supreme Court addressed whether the exclusionary rule could be extended to immigration proceedings.[85] The Court concluded that in general the answer was no. However, it added an important series of caveats to this ruling:

> [N]o challenge is raised here to the INS's own internal regulations. Our conclusions concerning the exclusionary rule's value might change if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread. Finally, we do not deal here with egregious violations of Fourth Amendment[86] or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.[87]

In his dissent, Justice White suggested that such egregious violations might occur if "evidence is obtained by deliberate violations of the Fourth Amendment or by conduct a reasonable officer should have known is in violation of the Constitution."[88]

The Ninth Circuit has accepted this formulation, finding that " 'all bad faith violation[s] of an individual's fourth amendment rights' are considered sufficiently egregious to 'require[ ] application of the exclusionary sanction in a civil . . . proceeding.' "[89] Accordingly, the court has applied the exclusionary rule when officers searched aliens' residence without

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[79] Lopez-Gabriel v. Holder, 653 F.3d 683, 687 (8th Cir. 2011); Puc-Ruiz v. Holder, 629 F.3d 771, 779 (8th Cir. 2010).

[80] Fadiga v. Att'y Gen. of the United States, 488 F.3d 142, 157 n.23 (3d Cir. 2007); *Bustos-Torres*, 898 F.2d at 1056; *Matter of Sandoval*, 17 I. & N. Dec. at 76-77 ("For this reason, every court of appeals that has considered the issue has held that the absence of *Miranda* warnings does not render an otherwise voluntary statement inadmissible in a deportation case.").

[81] 8 C.F.R. § 287.3(c).

[82] *See* next section.

[83] Martinez-Medina v. Holder, 673 F.3d 1029, 1033 (9th Cir. 2011).

[84] *See, e.g.*, United States v. Janis, 428 U.S. 433, 447 (1976) (warning that "[i]n the complex and turbulent history of the rule, the Court never has applied it to exclude evidence from a civil proceeding, federal or state.").

[85] *Lopez-Mendoza*, 468 U.S. at 1032.

[86] As an example of an egregious constitutional violation, Justice O'Connor cited *Rochin v. California*, 342 U.S. 165 (1952), in which police officers tried to extract narcotics from a defendant's throat, then brought him to a hospital, where they directed a doctor to pump his stomach to cause him to vomit up the drugs. The *Rochin* Court reversed the defendant's conviction because it was "obtained by methods that offend the Due Process Clause." *Id*. at 174.

[87] *Lopez-Mendoza*, 468 U.S. at 1050-51 (internal citations omitted). Note that in the quoted portion of the opinion Justice O'Connor was actually writing for a plurality, since only three other justices joined; however, the four dissenting justices would have extended the exclusionary rule to civil cases as well. *Id*. at 1051–61 (Brennan, White, Marshall, and Stevens, JJ., dissenting). "Thus, though technically correct to characterize the portion of the majority opinion recognizing a potential exception to the Court's holding as a 'plurality opinion,' eight Justices agreed that the exclusionary rule should apply in deportation/removal proceedings involving egregious or widespread Fourth Amendment violations." *Oliva-Ramos*, 694 F.3d at 271; *accord Puc-Ruiz*, 629 F.3d at 778; Gonzalez-Rivera v. INS, 22 F.3d 1441, 1448 n.2 (9th Cir. 1994).

[88] *Lopez-Mendoza*, 468 U.S. at 1060 (White, J., dissenting).

[89] *Gonzalez-Rivera*, 22 F.3d at 1449 (quoting Adamson v. C.I.R., 745 F.2d 541, 545 (9th Cir. 1984)) (alterations in the original).

a warrant or consent,[90] and when they stopped aliens solely because of their race.[91]

Other courts have also applied the "egregious violations" analysis,[92] but have not found conduct rising to that level.[93] They have nevertheless suggested in dicta that egregious violations might also include "improper seizures, illegal entry of homes, or arrests [that] occurred under threats, coercion or physical abuse,"[94] "an unreasonable show or use of force in arresting and detaining the alien,"[95] or invasion of private property and detention of suspects "with *no* articulable suspicion whatsoever."[96]

The Eighth Circuit has also cautioned that the Supreme Court appeared to categorically forbid the application of the exclusionary rule to bar evidence seized by one government from proceedings instituted by another.[97] The circuit court concluded, "we doubt that even an egregious violation by a state officer would justify suppression of evidence in a federal immigration proceeding," particularly where federal agents were not involved in the seizure and state officials were not acting on their behalf, because the exclusionary rule would have little deterrent effect in that situation.[98]

Evidence may also sometimes be suppressed if it was obtained in violation of express agency rules. As with the egregiousness analysis, not every violation will justify exclusion. Rather, the evidence must satisfy a two-part test: "First, the regulation in question must serve a 'purpose of benefit to the alien.' Secondly, . . . the regulatory violation will render the proceeding unlawful 'only if the violation prejudiced interests of the alien which were protected by the regulation.' "[99]

The test for prejudice is whether the violation of the agency regulations "harmed the aliens' interests in such a way as to affect potentially the outcome of their deportation proceeding."[100]

Although the alien must generally demonstrate the specific prejudice she suffered as a result of the violation, prejudice should be presumed if "compliance with the regulation is mandated by the Constitution."[101] "Similarly, where an entire procedural framework, designed to insure the fair processing of an action

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[90] Lopez-Rodriguez v. Mukasey, 536 F.3d 1012 (9th Cir. 2008) (IJ should have suppressed a statement obtained after agents unconstitutionally entered the alien's home without a warrant, consent, or exigent circumstances).

[91] Orhorhaghe v. INS, 38 F.3d 488, 497 (9th Cir. 1994) (finding INS officers' seizure of an alien at his residence and entry without voluntary consent constitutionally deficient when "the sole basis for the seizure was the defendant's racial background or national origin"); *Gonzalez-Rivera*, 22 F.3d at 1452; *accord* Almeida-Amaral v. Gonzales, 461 F.3d 231, 237 (2d Cir. 2006).

[92] The Second Circuit held that "exclusion of evidence is appropriate under the rule of *Lopez-Mendoza* if record evidence established either (a) that an egregious violation that was fundamentally unfair had occurred, or (b) that the violation—regardless of its egregiousness or unfairness—undermined the reliability of the evidence in dispute." *Almeida-Amaral*, 461 F.3d at 235. The Third Circuit amended the Second Circuit's test so that "evidence will be the result of an egregious violation within the meaning of *Lopez-Mendoza*, if the record evidence established either (a) that a constitutional violation that was fundamentally unfair had occurred, or (b) that the violation—regardless of its unfairness—undermined the reliability of the evidence in dispute." *Oliva-Ramos*, 694 F.3d at 277. Both courts rejected the Ninth Circuit's test, finding that "the inquiry does not turn on the good/bad faith of the agents involved. Rather, this is but one of many circumstances that may be relevant in a particular case." *Id*. at 279 n.24.

[93] *Oliva-Ramos*, 694 F.3d at 282 (remanding for a determination whether widespread raids that allegedly violate constitutional rights "justif[y] suppression under *Lopez-Mendoza*"); *Puc-Ruiz*, 629 F.3d at 778-79 (finding that a mere lack of probable cause for an alien's arrest does not rise to the level of an egregious violation, and pointing out that a constitutional violation by itself does not justify exclusion, so long as the violation was not egregious); *Gonzalez-Reyes*, 2009 U.S. App. LEXIS 3937, at *11 (holding that a minor's interrogation by an angry immigration officer outside the presence of family or counsel, without warning him of his right to remain silent, did not qualify, and adding that "Since the Supreme Court's 1984 decision in *Lopez-Mendoza*, we have never reversed, based on a finding of egregious violation of an alien's constitutional rights, an IJ's admitting into evidence an alien's statements."); *Almeida-Amaral*, 461 F.3d at 236 (finding that a suspicionless stop that violated the alien's Fourth Amendment rights did not justify exclusion, since "*Lopez-Mendoza* requires more than a violation to justify exclusion. It demands 'egregiousness.' "); Ruckbi v. INS, 285 F.3d 120, 126 (1st Cir. 2002) (refusing to suppress evidence when the alien's poor credibility suggested that his "belated Fourth Amendment challenge was not only groundless, but fabricated.").

[94] *Oliva-Ramos*, 694 F.3d at 279.

[95] *Puc-Ruiz*, 629 F.3d at 779.

[96] *Id*.

[97] *Lopez-Gabriel*, 653 F.3d at 686 (citing *Janis*, 428 U.S. at 459-60).

[98] *Id*.

[99] Matter of Garcia-Flores, 17 I. & N. Dec. 325, 328 (BIA 1980) (internal citations omitted).

[100] *Id*. at 328 (adopting the test set out in United States v. Calderon-Medina, 591 F.2d 529, 532 (9th Cir. 1979)) (quotation marks omitted).

[101] *Id*. at 329.

affecting an individual is created but then not followed by an agency, it can be deemed prejudicial."[102] However, courts have held that DHS officers' failure to issue warnings under 8 C.F.R. § 287.3, as well as other violations of that regulation, do not raise a constitutional issue such that prejudice may be presumed.[103]

Finally, the scope of the rule limits its value in the immigration context even if the exclusionary rule did operate more freely. The Supreme Court has long held that "the 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred."[104] Thus, DHS may summon an alien to a removal hearing even if it discovered the alien's illegal presence only after an illegal search or arrest.[105] Moreover, because the alien's identity will not be suppressed, DHS often finds independent evidence of alienage to discharge its burden in removal proceedings (for example, in the case of an alien who overstayed her visa, from looking up the alien's name, which is not suppressed, in federal immigration records whose information was not procured by the violation).[106]

[102] *Id*.

[103] Ali v. Gonzales, 440 F.3d 678, 682 (5th Cir. 2006); Mosqueda-Araujo v. Gonzales, 2005 U.S. App. LEXIS 12092, at *2 (9th Cir. June 16, 2005) (unpublished); Navarro-Chalan v. Ashcroft, 359 F.3d 19, 23 n.3 (1st Cir. 2004); Martinez-Camargo v. INS, 282 F.3d 487, 492 (7th Cir. 2002) (finding that compliance with § 287.3(a) is not constitutionally mandated and therefore prejudice cannot be presumed).

[104] *Lopez-Mendoza*, 468 U.S. at 1039 (citing Gerstein v. Pugh, 420 U.S. 103 (1975)).

[105] *Id*.; *see also* Torres-Hernandez v. Holder, 2012 U.S. App. LEXIS 19957, at *2 (5th Cir. Sept. 21, 2012) (per curiam) (unpublished) ("Even if she had shown a constitutional violation, the airport immigration agent obtained only her identity from her Texas identification card, and her identity is not suppressible."); *Matter of Gonzalez*, 16 I. & N. Dec. at 46 ("Counsel's contention that the proceedings should be terminated because they are tainted by the claimed illegal arrest is also without merit. Even if an alien's arrest were technically defective, subsequent deportation proceedings, otherwise lawful, would not thereby be vitiated.") (citation omitted).

[106] *Lopez-Mendoza*, 468 U.S. at 1043 (internal citation omitted); *Torres-Hernandez*, 2012 U.S. App. LEXIS 19957, at *2 ("Torres-Hernandez's alienage and immigration status were not suppressible as this information was obtained through an independent search of the Traveler Enforcement Compliance System (TECS) after immigration agents learned her identity."); *Gonzalez*, 16 I. & N. Dec. at 46 ("evidence in the prior possession of the Service cannot be said to be tainted by any illegality connected with a subsequent arrest").

IV. Authentication

Even if a document is admissible in theory, it still must be properly authenticated. The immigration regulations set out a detailed procedure for authentication, but litigants may also rely on other established methods, such as those laid out in the Federal Rules of Evidence and of Civil Procedure.

A. Procedures specified in the immigration regulations

1. Domestic records

Either party may move to admit official domestic records, including criminal records. Such records are self-authenticating if offered as "an official publication," or as a copy certified by the official custodian or her "authorized deputy."[107]

The existence of a criminal conviction may be shown by a number of documents that are automatically admissible, including the "record of judgment and conviction," a "record of plea, verdict and sentence," an "abstract of a record of conviction," docket entries, and court transcripts.[108] Criminal convictions may also be proven through "any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction."[109] These documents still must be either official publications or authenticated copies.[110]

The agency may also arrange to have any of these documents submitted electronically to the immigration court directly from the state or judicial court records. Such electronic documents must still be certified by the state or court official as a true "copy" of an official record. The DHS official submitting the document must also certify that she received it electronically from the state or court.[111]

The regulations also include a catchall provision, permitting the submission of "[a]ny other evidence

[107] 8 C.F.R. §§ 287.6(a), 1287.6(a).

[108] 8 C.F.R. § 1003.41(a).

[109] 8 C.F.R. § 1003.41(a)(6).

[110] 8 C.F.R. § 1003.41(b) (requiring these documents to comply with the authentication procedure set out in § 287.6(a)). Copies of the specified documents are also admissible if the immigration officer attests in writing that the offered document is "a true and correct copy of the original." *Id*.

[111] 8 C.F.R. § 1003.41(c).

that reasonably indicates the existence of a criminal conviction."[112] The BIA has ruled, however, that this provision does not allow a back door for evidence that is not properly certified according to the prior provisions. Instead, the provision is meant to give IJs the flexibility to admit types of documents that were not specifically enumerated.[113]

2. Foreign records

The regulations set out two methods for authenticating non-Canadian foreign records, depending on whether the country from which they originate has signed the 1961 Hague Convention of Abolishing the Requirement of Legalisation for Foreign Public Documents.[114] Public documents[115] from signatory countries must be either "evidenced by an official publication, or by a copy properly certified under the Convention,"[116] but do not need to be certified by a Foreign Service officer.[117] Official records from nonsignatory countries must first "be evidenced by an official publication thereof, or by a copy attested by an officer so authorized."[118] The party offering the document may, but does not have to, further certify the attested copy through "a chain of certificates," in each of which an "authorized foreign officer" certifies the prior officer's "official position" and "the genuineness of the signature."[119] Second, the documents must be further certified by an officer of the United States Foreign Service "stationed in the foreign country where the record is kept."[120]

Official Canadian governmental records may simply "be evidenced by a certified copy of the original record attested by the official having legal custody of the record or by an authorized deputy."[121]

B. Alternative forms of authentication

A number of federal circuits have held that the authentication procedure under § 1287.6 is not exclusive, meaning that "[d]ocuments may be authenticated in immigration proceedings through any recognized procedure."[122]

Both the Federal Rules of Civil Procedure[123] and the Federal Rules of Evidence[124] provide valid

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[112] 8 C.F.R. § 1003.41(d).

[113] *Matter of Velasquez*, 25 I. & N. Dec. at 685-86.

[114] One may find the signatories to the convention listed alphabetically at the website of the Hague Conference on Private International Law, http://www.hcch.net/ index_en.php?act=states.listing. From the site's Hague Legalization Convention page, one may click on the Status Table link to see when the treaty became applicable in each country.

[115] Public documents are defined as

> (i) Documents emanating from an authority or an official connected with the courts of tribunals of the state, including those emanating from a public prosecutor, a clerk of a court or a process server; (ii) Administrative documents; (iii) Notarial acts; and (iv) Official certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date, and official and notarial authentication of signatures.

8 C.F.R. § 1287.6(c)(3). Public documents do not include those "executed by diplomatic or consular agents," or "[a]dministrative documents dealing directly with commercial or customs operations." 8 C.F.R. § 1287.6(c)(4).

[116] 8 C.F.R. § 1287.6(c)(1). "This certificate must be signed by a foreign officer so authorized by the signatory country, and it must certify (i) the authenticity of the signature of the person signing the document; (ii) the capacity in which that person acted, and (iii) where appropriate, the identity of the seal or stamp which the document bears." *Id*.

[117] 8 C.F.R. § 1287.6(c)(2).

[118] 8 C.F.R. § 1287.6(b)(1).

[119] *Id*.

[120] 8 C.F.R. § 1287.6(b)(2). This certification in turn attests to both the "genuineness of the signature and the official position either of (i) the attesting officer; or (ii) any foreign officer whose certification of genuineness of signature and official position relates directly to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation." *Id*.

[121] 8 C.F.R. § 1287.6(d).

[122] Khan v. INS, 237 F.3d 1143, 1144 (9th Cir. 2001) (internal quotation marks removed); *see* Jiang v. Gonzales, 474 F.3d 25, 29 n.4 (1st Cir. 2007); Chen v. Gonzales, 434 F.3d 212, 218 n.6 (3d Cir. 2005) ("Failure to comply with § 287.6 does not, in any case, result in a *per se* exclusion of documentary evidence, and a petitioner is permitted to prove authenticity in another manner."); Georgis v. Ashcroft, 328 F.3d 962, 969 (7th Cir. 2003); *see also* Matter of H-L-H- & Z-Y-Z-, 25 I. & N. Dec. 209, 215 n.5 (BIA 2010) ("The regulation governing the authentication of official records and public documents in immigration proceedings at 8 C.F.R. § 1287.6 (2010) does not provide the exclusive means for authenticating documents in immigration proceedings.").

[123] *Khan*, 237 F.3d at 1144.

[124] Qiu Yun Chen v. Holder, 715 F.3d 207, 211 (7th Cir. 2013); Vatyan v. Mukasey, 508 F.3d 1179, 1182-84 (9th Cir. 2007); Liu v. Ashcroft, 372 F.3d 529, 532-33 (3d Cir. 2004). *But see* Li Jiao Chen v. Att'y Gen. of the United States, 2013 U.S. App. LEXIS 8389, at *6-7 (3d Cir. Apr. 25, 2013) (per curiam) (unpublished) ("Chen contends that some of the documents are from Chinese government web sites and thus are self-authenticating under Federal Rule of Evidence 902(5). The Federal Rules of Evidence, however, do not apply in asylum proceedings. Because no other means of proving authenticity was attempted for the documents from Chinese government web sites, we cannot say that the BIA abused its discretion by requiring authentication.") (internal citation omitted).

alternatives to authentication under § 1287.6. These rules allow for two methods of authentication: a certification procedure for self-authenticated documents similar to § 1287.6,[125] and a more flexible process of establishing, by additional evidence, "that the item is what the proponent claims it is."[126] Such flexibility is necessary, since "[r]equiring an asylum petitioner to obtain a certification from the very government he claims has persecuted him or has failed to protect him from persecution would in some cases create an insuperable barrier to admission of authentic documents."[127]

Courts stress that, notwithstanding specific suggestions for authentication provided in the Rules, "the central condition can be proved in any way that makes sense in the circumstances."[128] For instance, a Chinese asylum petitioner who likely could not have a notice from her local Village Committee notarized in order to authenticate it to prove her persecution could have at least "proved that the notice was what she said it was" by, for instance, showing that the Village Committee "actually existed and had law enforcement responsibilities or by comparing the seal on her notice to the seals on other notices issued by the Committee."[129]

The flexibility built into these forms of authentication ensures that "Immigration judges retain broad discretion to accept a document as authentic or not based on the particular factual showing presented.[130] Moreover, "[s]ince [§ 287.6's] procedures generally require attestation of documents by the very government the alien is seeking to escape, courts generally do not view the alien's failure to obtain authentication as requiring the rejection of a document."[131] Rather, the judges may find the documents' "evidentiary value to be limited."[132]

Even for non-asylum cases, if a party fails to properly authenticate a document, this does not necessarily render the document inadmissible. Rather, the IJ, in her broad discretion, may simply afford less weight to unattributed or uncertified documents.[133] In fact, the BIA has held that "issues regarding authentication and chain of custody generally go to the weight of the evidence, not its admissibility."[134]

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[125] Fed. R. Evid 902(3); Fed. R. Civ. P. 44(a)(2).

[126] Fed. R. Evid. 901(a); *see also* Fed. R. Civ. P. Rule 44(a)(2)(C) (providing that, "If all parties have had a reasonable opportunity to investigate a foreign record's authenticity and accuracy, the court may, for good cause, . . . admit an attested copy without final certification; or . . . permit the record to be evidenced by an attested summary with or without a final certification.").

[127] *Vatyan*, 508 F.3d at 1183.

[128] *Yongo*, 355 F.3d at 30-31 (citing Fed. R. Evid. 901-902).

[129] Xiu Xia Zheng v. Holder, 2013 U.S. App. LEXIS 2865, at *9 (1st Cir. Feb. 11, 2013) (per curiam) (unpublished).

[130] *Vatyan v. Mukasey*, 508 F.3d at 1185; *see also* Lin v. Gonzales, 434 F.3d 1158, 1164 (9th Cir. 2006) (citing Bropleh v. Gonzales, 428 F.3d 772, 777 (8th Cir. 2005)).

[131] Yan v. Gonzales, 438 F.3d 1249, 1256 n.7 (10th Cir. 2006)) (emphasis in original); *see also* Ding v. Ashcroft, 387 F.3d 1131, 1135 n.4 (9th Cir. 2004) ("The exclusion of documents because the Chinese authorities refused to authenticate them runs contrary to our longstanding principle excusing such authentication because '[p]ersecutors are hardly likely to provide their victims with [documentation] attesting to their acts of persecution.' "); Abankwah v. INS, 185 F.3d 18, 26 (2d Cir.1999) ("[I]t must be acknowledged that a genuine refugee does not flee her native country armed with affidavits, expert witnesses, and extensive documentation.").

[132] *Yan*, 438 F.3d at 1256 n.7; *see also Xiu Xia Zheng*, 2013 U.S. App. LEXIS 2865, at *8 ("[W]hen the BIA considers a motion to reopen proceedings, it has the discretion to afford less evidentiary weight to unauthenticated government documents from China").

[133] *Matter of H-L-H*, 25 I. & N. Dec. at 214.

[134] *Matter of D-R-*, 25 I. & N. Dec. at 459.